Natural Resources Defense Council – Southern Utah Wilderness Alliance –
The Wilderness Society – Utah Chapter of the Sierra Club

HAND DELIVERED

October 2, 2017

Ed Roberson
Utah State Director
Bureau of Land Management
440 West 200 South, Suite 500
Salt Lake City, UT 84101-1345

RE: Protest of the Bureau of Land Management, Green River District's Notice of Competitive Oil and Gas Lease Sale to be held on or around December 12, 2017

Dear Mr. Roberson:

In accordance with 43 C.F.R. §§ 4.450-2 and 3120, the Natural Resources Defense Council, Southern Utah Wilderness Alliance, The Wilderness Society, and Utah Chapter of the Sierra Club (collectively, "SUWA") hereby timely protest the December 12, 2017 offering of the following fifteen oil and gas lease sale parcels in the Bureau of Land Management, Price Field Office (BLM):

> UTU-92715 (Parcel 88); UTU-92716 (Parcel 89); UTU-92717 (Parcel 90); UTU-92718 (Parcel 91); UTU-92719 (Parcel 92); UTU-92720 (Parcel 93); UTU-92721 (Parcel 94); UTU-92722 (Parcel 95); UTU-92723 (Parcel 96); UTU-92724 (Parcel 97); UTU-92725 (Parcel 98); UTU-92726 (Parcel 99); UTU-92727 (Parcel 100); UTU-92728 (Parcel 101); UTU-92729 (Parcel 102) (collectively, "Protested Parcels").

See generally December 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G020-2017-0030-EA, Appendix A (Proposed Action with Stipulations for Lease) (Aug. 2017) ("Lease Sale EA" or "EA") (attached). As explained below, BLM's decision to sell these parcels violates the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*,; the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*; the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-559, 701-706, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* and the regulations and policies that implement these laws.

I. Leasing Is the Point of Irretrievable Commitment of Resources

It is critical that BLM undertake satisfactory comprehensive NEPA analysis before issuing deciding to offer, sell and issue the Protested Parcels as subsequent approvals by BLM will not be able to completely eliminate potential environmental impacts. Unfortunately, BLM has not

fully analyzed potential irreversible and irretrievable impacts that could flow from its leasing decision. The sale of leases without no surface occupancy ("NSO") stipulations represents a full and irretrievable commitment of resources. BLM cannot make such a commitment without adequate analysis:

> BLM regulations, the courts and [Interior Board of Land Appeals ("Board")] precedent proceed under the notion that the issuance of a lease without an NSO stipulation conveys to the lessee an interest and a right so secure that full NEPA review must be conducted prior to the decision to lease.

S. Utah Wilderness Alliance, 159 IBLA 220, 241 (2003); *see also Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1159 (10th Cir. 2004) ("Agencies are required to satisfy the NEPA 'before committing themselves irretrievably to a given course of action, so that the action can be shaped to account for environmental values.'" (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988))). Thus, in *Southern Utah Wilderness Alliance*, the IBLA explained that

> [t]he courts have held that the Department must prepare an [environmental impact statement ("EIS")] before it may decide to issue such "non-NSO" oil and gas leases. The reason . . . is that a "non-NSO" lease "does not reserve to the government the absolute right to prevent all surface disturbing activities" and thus its issuance constitutes "an irretrievable commitment of resources" under section 102 of NEPA.

159 IBLA at 241 (quoting Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998)).

As the Board has recognized, "[i]f BLM has not retained the authority to preclude *all* surface disturbance activity, then the decision to lease is itself the point of 'irreversible, irretrievable commitment of resources' mandating the preparation of an EIS.'" *Union Oil Co. of Cal.*, 102 IBLA 187, 189 (1988) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983)) (emphasis added); *see also S. Utah Wilderness Alliance*, 159 IBLA at 241-43 (same); *Sierra Club, Or. Chapter*, 87 IBLA 1, 5 (1985) (finding that because issuance of non-NSO oil and gas leases constitutes an irreversible commitment of resources, BLM cannot defer preparation of an EIS unless it either retains authority to preclude development or issues the leases as NSO).

BLM itself identifies lease issuance as the point of irretrievable commitment of resources:

> The BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. *By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance.*

BLM, H – 1624-1 – Planning for Fluid Mineral Resources § I.B.2, at I-2 (Jan. 28, 2013) (emphasis added) (attached); *see also S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1256 (D. Utah 2006) ("In sum, 'in the fluid minerals program, the point of irretrievable and irreversible commitment occurs at the point of lease issuance." (quoting *Pennaco*, 377 F.3d at 1160) (internal alterations omitted)).

In the present case, BLM has failed to analyze all reasonable, foreseeable potential impacts of oil and gas development from the above-listed leases and instead has unlawfully delayed that analysis to a later date. As explained below, this failure may have irreversible negative impacts on numerous values including, but not limited to, cultural resources, lands with wilderness characteristics ("LWC"), and areas of critical environmental concern ("ACEC").

II. BLM Violated the NHPA and NEPA in its Treatment of Cultural Resources[1]

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America's historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a "stop, look, and listen provision" that requires federal agencies to consider the effects of their actions and programs on historic properties and sacred sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *see also Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004).

To adequately "take into account" the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation (Advisory Council).[2] Under these regulations, the first step in the Section 106 process is for an agency to determine whether the "proposed [f]ederal action is an undertaking as defined in [Section] 800.16(y)." 36 C.F.R. § 800.3(a). Undertakings include any permit or approval authorizing use of federal lands. *Id.* § 800.16(y). If the proposed action is an undertaking, the agency must determine "whether it is a type of activity that has the potential to cause effects on historic properties." *Id.* § 800.3(a). An effect is defined broadly to include direct, indirect and/or cumulative adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

---

[1] This argument pertains to all Protested Parcels.

[2] The Advisory Council, the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. *See Nat'l Ctr. for Pres. Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C. 1980), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980); *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 115 (D.C. Cir. 2006) ("[T]he Advisory Council regulations command substantial judicial deference.") (quotations and citations omitted). The Advisory Council's regulations "govern the implementation of Section 106" for all federal agencies. *Nat'l Ctr. for Pres. Law*, 496 F. Supp. at 742.

The agency next "[d]etermine[s] and document[s] the area of potential effects" and then "[r]eview[s] existing information on historic properties within [that] area." 36 C.F.R. § 800.4(a)(1)-(2). "Based on the information gathered, . . . the agency . . . shall take the steps necessary to identify historic properties within the area of potential effects." *Id.* § 800.4(b). "The agency shall make a reasonable and good faith effort to carry out appropriate identification efforts." *Id.* § 800.4(b)(1).

If the undertaking is a type of activity with the potential to affect historic properties then the agency must determine whether in fact those properties "may be affected" by the particular undertaking at hand. *Id.* § 800.4(d)(2).[3] Having identified the historic properties that may be affected, the agency considers whether the effect will be adverse, using the broad criteria and examples set forth in section 800.5(a)(1). Adverse effects include the "[p]hysical destruction of or damage to all or part of the property." *Id.* § 800.5(a)(2)(i). If the agency concludes that the undertaking's effects do not meet the "adverse effects" criteria, it is to document that conclusion and propose a finding of "no adverse effects." *Id.* § 800.5(b), 800.5(d)(1).

In addition to identifying and consulting with Native American tribes, "[c]ertain individuals and organizations with a demonstrated interest in [an] undertaking may participate as consulting parties due to … their concern with the undertaking's effects on historic properties." 36 C.F.R. § 800.2(c)(5). If BLM "proposes a finding of no adverse effect, [it] shall notify all consulting parties and provide them with the documentation specified" in § 800.11(e). *Id.* § 800.5(c). "If, within the 30 day review period . . . any consulting party notifies [BLM] in writing that it disagrees with the [no adverse effect' finding and specifies the reason for the disagreement in the notification, [BLM] shall either consult with the party to resolve the disagreement, or request the [ACHP] to review the findings." *Id.* § 800.5(c)(2)(i).

"The agency official should [also] seek the concurrence of any Indian tribe . . . that has made known to the agency official that it attaches religious and cultural significance to a historic property subject" to a no adverse effect finding. *Id.* § 800.5(c)(2)(iii).

If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

As BLM acknowledges, "leasing [] conveys the rights to develop a parcel to a lessee." EA, Appendix D at 113. Leasing is the point at which BLM makes an irretrievable commitment of resources such that BLM can no longer preclude surface disturbing activities on lease parcels. *See, e.g., Union Oil Co. of Cal et al.*, 102 IBLA at 189. Accordingly, BLM must comply with the NHPA and NEPA at the leasing stage. It has failed to do so here.

SUWA is a consulting party for the December 2017 lease sale. BLM initiated consultation for the December 2017 lease sale in March of 2017 and provided a cultural resources report to consulting parties with a preliminary determination that the proposed lease sale would have "no

[3] The agency may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Native American tribes of its conclusion. *Id.* § 800.4(d)(1).

adverse effect" on cultural resources. *See* BLM, Utah State Office, Summary Report of Cultural Resource Inspection, at 6 (June 15, 2017) (Cultural Resources Report). In April 2017, consulting parties SUWA and Utah Rock Art Research Association (URARA) submitted letters objecting to BLM's preliminary "no adverse effect" determination. *Id.* at 6-7. In May of 2017, the Hopi Tribe submitted a letter to BLM objecting to BLM's no adverse effect determination, especially in areas with high densities of prehistoric sites, and recommended that all parcels be withdrawn until BLM obtained additional cultural resource information. *See* Letter from Leigh J. Kuwanwisiwma, Director, Hopi Cultural Preservation Office to Ahmed Mohsen, Field Manager, BLM, Price Field Office (May 1, 2017) (attached). In June 2017, BLM sent a revised cultural resource report to consulting parties. In July 2017, SUWA and URARA submitted comments disagreeing with BLM's determination of "no adverse effect." To date, both SUWA and URARA's concerns have been left unresolved. The Hopi's concerns have also have not been resolved.

a. BLM Failed to Make A Reasonable and Good Faith Effort to Identify Cultural Resources

The Price field office prepared a cultural resources "records search" to support the December 2017 oil and gas lease sale. This is insufficient to meet BLM's obligation to make a reasonable and good faith effort to identify historic properties *before* it makes an irreversible commitment of resources. As the Advisory Council emphasized in its preamble to the Section 106 regulations, knowing the historic properties at risk from an undertaking is essential: "[i]t is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place." 65 Fed. Reg. 77,698, 77,715 (Dec. 12, 2000); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 861-62 (10th Cir. 1995) (holding that U.S. Forest Service failed to make a good faith effort to identify cultural resources when it concluded that a canyon did not contain traditional cultural properties despite having information to the contrary).

BLM relies heavily on *S. Utah Wilderness Alliance*, 177 IBLA 89 (2009), to justify its assertion that it has made a reasonable and good faith effort to identify cultural resources. *See* EA, Appendix D at 109-11. However, *S. Utah Wilderness Alliance* is clear that a literature review or similar effort may not be sufficient to comply with the NHPA at the lease sale stage.[4] 177 IBLA at 99. Instead, the IBLA held that there are "circumstances in which there is such a paucity of information that a Class I inventory is essentially meaningless." *Id.* The leases at issue here present just that situation.

Only 2.9% of the total lease sale area has been surveyed. *See* EA at 18. Of the fifteen parcels at issue, four of the parcels still have not been surveyed at all (092, 093, 099, 101). *See* Cultural Resource Report at 10. Even with the minimal survey coverage for the remaining eleven parcels (ranging from .29% to 10%), prior identification efforts have located forty-one documented sites, with an additional nineteen reported to the BLM by URARA over the past 6 months.[5] EA at 18.

[4] In *S. Utah Wilderness Alliance*, the Board refers to BLM's work as a Class I inventory; however, it is clear from the details of that case that BLM performed only a literature review.

[5] BLM attempts to dismiss URARA's information by claiming that Jonathan Bailey inappropriately "split" sites. *See* EA, Appendix D at 111-112. However, BLM misconstrued URARA's information, assuming without verifying

BLM has determined or recommended that twenty-three of the documented forty-one sites are eligible for the National Register of Historic Places (NRHP). *Id.* The eighteen remaining sites either have not been evaluated for NRHP eligibility or were determined to be ineligible. *Id.* BLM has not determined the eligibility of the URARA-provided sites. *Id.* BLM's failure to determine eligibility for URARA's new sites is especially problematic because rock art sites are generally found to be eligible. *See, e.g.*, BLM, San Rafael Desert Master Leasing Plan Cultural Resources Site Location Model and Class II Sample Survey, at 86 (July 2017) (PFO Class II) (assuming the rock art sites are eligible for listing on the NRHP).[6] Accordingly, these new sites could have a significant impact on BLM's determination of effect. Furthermore, URARA has continued to provide BLM with additional, new information about cultural sites in the lease area that BLM has not accounted for in the NHPA process. *See generally* URARA, *Comments on the Price Field Office Section 106 Cultural Report Determination of No Effect for the December 2017 Oil and Gas Lease Sale* (July 21, 2017) (attached). BLM must – at the very least – defer leasing until it has accounted for this information as part of its obligation to make a reasonable and good faith identification effort.

The two inventories that BLM cites to bolster its claim that it made a reasonable and good faith effort to identify cultural resources – the *Molen Reef Class II* and the *Price Field Office Class II* – in fact undercut that claim. The Molen Reef Class II highlights the weaknesses of site location models. It notes that "a model is only as good as the data used to construct it." *See* BLM, Molen Reef Site Location Model and Class II Survey, Emery County, Utah, at 20 (Sept. 20, 2017). BLM must have sufficient information on existing sites to create a useable model. The Class II makes clear that the predictive model here is "imprecise" and provided mixed results because of the small sample size from which to derive the information. *Id.* at 45-46. To the extent it is useable, the model shows high potential areas in several of the proposed lease parcels. *Id.* at 28.

The Price Field Office-wide Class II is similarly unhelpful. It focuses primarily on the San Rafael Desert MLP area, extending slightly beyond those borders; but it does not include Molen Reef – the location of the parcels proposed for leasing. *See* PFO Class II at 7. Despite both BLM's and the Class II's claims to the contrary, the model – at least the one mapped in the Class II – does not encompass the entire field office and specifically does not include the parcels at issue in this sale. *See id.* at 29, 31. Accordingly, the Price Field Office-wide Class II has little utility in this lease sale.

BLM's efforts to date do not meet its obligation to make a reasonable and good faith effort to identify cultural resources.

---

that site location points represented smaller areas than they do on the ground. Furthermore, BLM's Molen Reef Class II makes clear that any site splitting from URARA was limited, and not widespread. *See* BLM, Molen Reef Site Location Model and Class I Survey, Emery County, Utah, at 45 (Sept. 20, 2017) (noting that Montgomery Archeological Consultants re-classified six URARA-identified sites in the Class II sample as four sites).

[6] BLM is treating the Class II and its associated model prepared for the San Rafael Desert MLP as though it applies to the entire field office. It is clear both from the title of the document and the maps included therein that it only refers to a small portion of the Price Field Office. *Compare* PFO Class II, at 29 (referencing a composite sensitivity map for the entire Price Field Office planning area and indicating its inclusion in Figure 2), *with* PFO Class II Fig. 2, at 31 (showing a map of only the eastern side of the Price Field Office).

b. BLM's No Adverse Effects Determination is Unsupported and Arbitrary

BLM's conclusion that the sale of the fifteen parcels at issue in this protest will result in "no adverse effect" to historic properties is arbitrary and capricious. NHPA regulations provide that BLM must determine whether an undertaking *may* have an adverse effect on historic properties. *See* 36 C.F.R. § 800.4(d)(2); 36 C.F.R. § 800.5(a). Recently, the ACHP reiterated to BLM that "[a]n adverse effect finding does not need to be predicated on a certainty." *See* Letter from Reid J. Nelson, Director in the Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Ester McCullough, Vernal Field Office Manager, Bureau of Land Management (Dec. 12, 2016) (attached). Furthermore, "adverse effects" are defined broadly and include impacts to a historic property's "location, design, setting, materials, workmanship, or association." 36 C.F.R. § 800.5(a)(1). Adverse effects include "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." *Id.* § 800.5(a)(2)(v).

First, the Lease Sale EA makes clear that there are potential impacts from leasing in the fifteen parcels at issue. The EA details potential adverse impacts to cultural resources, including "physical damage or destruction of the property; changes in the physical setting of the historic property that contribute to the properties significance; and introduction of visual, atmospheric, or audible elements that diminish the property's significant historic features." EA at 36. In its response to comments, BLM asserts that any such impacts will only affect sites that are not eligible for listing under the NRHP. *See* EA, Appendix D at 114 (stating that impacts from a future oil and gas related project would impact only sites that are not eligible for the National Register of Historic Place). The Lease Sale EA itself contradicts that claim. The Lease Sale EA acknowledges in its cumulative impact analysis that oil and gas-related development "could impact the setting and feeling of both the individual landscapes surrounding sites and the overall cultural landscape and feeling of the Molen Reef Area." EA at 51. Such broad impacts to both site specific and overall cultural landscape would not and cannot be limited to NRHP-eligible sites, nor does BLM offer any support whatsoever for this remarkable claim. For purposes of the NHPA there is no distinguishing between direct, indirect or cumulative effects; they are all "effects." *See* 36 C.F.R. §800.5(a)(1). Thus, BLM's candid admission that there may be indirect and cumulative effects from leasing means BLM's assertion that there will be "no adverse effects" is plainly incorrect. Precisely because there *may be* adverse effects, BLM must continue to follow the processes set forth in 36 C.F.R. §§ 800.5-800.6.

Second, BLM's determination of no adverse effect ignores the topography of the lease sale parcels. As BLM is well aware, the Molen Reefs run north to south and create barriers to east and west routes for roads and pipelines. *See* URARA Comments at 2. There are few existing routes within the parcels. *See* Cultural Resource Density and Area Transportation Map (attached) (depicting BLM-designated routes and cultural resource density within the lease sale parcels).[7] To access several of the lease sale parcels, operators would have to construct new roads. *See id.* Thus it is reasonable to anticipate that construction and use of these new roads may have an adverse effect on cultural resources because of their likely placement through concentrations of cultural resources, as well as the "introduction of visual, atmospheric, or

[7] The cultural resource densities are based on cultural resource maps from URARA. The red indicates high densities of known cultural sites.

audible elements" to a remote and undisturbed area. For example, there is no existing road in lease UT-1217-100. *See* Cultural Resource Density and Area Transportation Map. UT-1217-100 would likely have to be accessed by constructing a road extending from Dog Hollow Reservoir Road. *Id.* The most logical location for that new road would be through a gap in the reef – Red Hole Draw – as opposed to up and over the steep slopes surrounding that gap. *See, e.g.*, BLM, Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development: The Gold Book, at 21-22 (4th Ed. 2007) (Gold Book) (encouraging oil and gas operators to construct roads along the contours of the land and cautioning operators from constructing roads on steep slopes); *cf. id.* at 36 (noting that operators should avoid locating pipelines and flowlines on steep slopes). However, the gaps in the reef are also associated with a higher density of cultural sites. *See* Cultural Resource Density and Area Transportation Map. New roads through these high density cultural areas indeed may affect cultural resources.

Cultural resources also may be affected in lease sale parcels with existing roads. Many of the roads within the parcels are primitive and infrequently used. *See, e.g.*, Photo of Molen Wash Road (attached). It is entirely foreseeable that these roads would be upgraded to allow for the passage of drilling equipment as well as tanker trucks should the well go into production. *See* EA at 9 (listing typical vehicles used in well drilling and completion); *see also* Gold Book, at 22 (encouraging the use of existing roads and noting that operators may be required to upgrade those existing roads to accommodate oil and gas operations). For example, the Molen Wash Road extends through lease parcels UT1217-095, UT1217-092, and UT1217-089. *See* Cultural Resource Density and Area Transportation Map. It also travels through high density cultural areas. *See id.* Any improvement or increased use of this road may affect those cultural resources. In fact, BLM acknowledges that road improvement and development may impact cultural resources by increasing dust and potentially covering and abrading rock art panels, but nevertheless determines that cultural resources will not be affected. EA at 51. This determination is arbitrary and capricious.

Finally, BLM cannot rely on a concurrence from the State Historic Preservation Office ("SHPO") as evidence that it complied with NHPA Section 106 processes.

> While the NEPA requires BLM to consult with the Utah SHPO, its consultation with SHPO merely satisfies the procedural requirement of doing such a consultation. A concurrence from the SHPO *does not satisfy the other procedural requirements of NHPA*. There is nothing in the NHPA or Section 106 that excuses the BLM's failure to comply with the other procedures based on a concurrence from the SHPO.

S. Utah Wilderness Alliance v. Burke, 981 F.Supp. 2d 1099, 1109 (D. Utah 2013), *vacated* (emphasis added); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 808-09 (9th Cir. 1999) (asserting that SHPO's concurrence with the U.S. Forest Service's proposal did not satisfy the agency's obligation to minimize adverse effects to a historic aboriginal transportation route. SHPO's concurrence with BLM's determination does not excuse BLM from its failure to comply with the NHPA.

III. BLM Violated NEPA's Alternatives Requirement[8]

a. Legal Framework – NEPA Alternatives Analysis

An EA must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved resource conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *see* 40 C.F.R. § 1508.9(b); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) ("An agency's obligation to consider reasonable alternatives is 'operative even if the agency finds no significant environmental impact.'" (quoting *Highway J Citizens Group v. Mineta,* 349 F.3d 938, 960 (7th Cir.2003))). Though less detailed than an EIS, an EA must demonstrate that the agency took a "hard look" at alternatives – a "thoughtful and probing reflection of the possible impacts associated with the proposed project" so as to "provide a reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006) (quoting *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir.1993)); *see also* 40 C.F.R. § 1508.9(a)(1).

The range of alternatives an agency must analyze in an EA is determined by a "rule of reason and practicality" in light of a project's objective. *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (quoting *Airport Neighbors Alliance, Inc. v. United States,* 90 F.3d 426, 432 (10th Cir.1996)). "NEPA 'does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective. . . .'" *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) (quoting *Colo. Envtl. Coal. v. Dombeck,* 185 F.3d 1162, 1174 (10th Cir.1999)). But the number and nature of alternatives must be "sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Id.* (quoting *Dombeck*, 185 F.3d at 1174).

In an EA, as in an EIS, the range of alternatives an agency must analyze depends on its purpose and need statement. *See Davis*, 302 F.3d at 1119; *see also* 40 C.F.R. § 1508.9(b) (requiring that EAs include "brief discussions of the need for a proposal" and alternatives to it). "Alternatives that do not accomplish the purpose of an action are not reasonable." *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001). Stated differently, "[i]t is the BLM purpose and need for action that will dictate the range of alternatives and provide a basis for the rationale for eventual selection of an alternative in a decision." BLM, National Environmental Policy Act, Handbook H-1790-1 § 6.2, at 35 (Jan. 2008) (attached). After "defining the objectives of an action," the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes." *Dombeck*, 185 F.3d at 1175.

Notably, "[t]he broader the purpose and need statement, the broader the range of alternatives that must be analyzed." National Environmental Policy Act, Handbook H-1790-1 § 6.2.1, at 36; *see also id.* § 6.6.1, at 49. "In determining the alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative." *Id.* § 6.6.1, at 50. Likewise, BLM's NEPA alternatives analysis requirement is *independent of and broader than* its obligation to determine whether oil and gas leasing and development will have a significant impact to the environment:

[8] This argument pertains to all Protested Parcels.

> [C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, . . . the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the later does not come into play unless the action will have significant environmental effects. . . . Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988) (citations omitted).

b. BLM Analyzed Only the Extreme Lease-Nothing or Lease-Everything Alternatives

BLM's stated purpose and need for the December 2017 lease sale is exceedingly broad:

> The purpose of the Proposed Action is to *respond* to the nominations or expressions of interest for oil and gas leasing on specific federal mineral estate through a competitive leasing process.

EA at 3 (emphasis added). This sweeping objective governs BLM's range of alternatives as well as dictates the reasonableness of proposed alternatives including those proposed by SUWA.[9]

In the present matter, BLM received fifteen parcel nominations or expressions of interest comprising approximately 32,000 acres of federal public land. *See* EA at 3. BLM analyzed only two alternatives: the lease-nothing (no action) and lease-everything (proposed action) alternatives. *Id.* at 11. And now BLM intends to offer fifteen parcels comprising all 32,000 acres of public land identified in the proposed action (*i.e.*, BLM adopted the lease-everything alternative without even minor modification). *See* BLM, Finding of No Significant Impacts, December 2017 Oil and Gas Lease Sale (Environmental Assessment DOI-BLM-UT-G020-2017-0030) at 1 (Sept. 2017) (attached).

In comments on the draft EA, SUWA proposed two alternatives that – objectively – satisfy the sweeping purpose and need of that document:

- Adjustment of the nominated parcel boundaries to exclude from leasing land encompassed by URARA's proposed ACEC corrected boundaries, and

[9] Notably, the purpose and need is *not* to offer for competitive lease – or issue – any of the nominated parcels. *Cf. New Mexico ex rel. Richardson*, 565 F.3d at 710 ("It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.").

- Adjustment of the nominated parcel boundaries to exclude from leasing land encompassed by BLM-identified LWC.

See SUWA et al. Comments on December 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-UT-G020-2017-0030-EA at 3 (July 23, 2017) (comment letter and exhibits thereto attached). *See also* URARA Comments on the BLM Price Field Office's December 2017 Oil and Gas Lease Sale, DOI-BLM-UT-G020-2017-0030-EA (June 2017) (comment letter and exhibits thereto attached).[10] SUWA also herein incorporates in its entirety the Protest submitted by URARA on October 2, 2017 in this matter. *See* URARA, Protest the BLM Price Field Office's December 2017 Oil and Gas Lease Sale, DOI-BLM-UT-G020-2017-0030-EA (June 2017) FONSI (Oct. 2, 2017) (attached). Both of SUWA's proposed alternatives would allow BLM to "respond" to the parcel nominations and expressions of interest and thus – objectively – satisfied the purpose and need of the Lease Sale EA. Nevertheless, in its response to comments BLM argues that its consideration of only the extremes – the lease-nothing or lease-everything alternatives – met its NEPA obligations to make an informed choice among options. BLM offers three reasons to support its argument:

- "No unresolved resource conflicts regarding alternative uses of available resources are known or anticipated under either alternative;"

- The Utah BLM State Director in the Decision Record may still elect, at his discretion, to defer from leasing, in whole or in part, the nominated parcels prior to issuing any of the leases; and

- The lease-nothing (no action) alternative satisfied BLM's obligation to consider an alternative to avoid or minimize impacts to wilderness characteristics.

EA at 106-07, 118. BLM's reasoning is arbitrary and capricious.

BLM never disputed – nor could it – that SUWA's recommended alternatives (1) would accomplish the purpose and need of the lease sale, (2) are technically and economically feasible, and (3) will have a lesser impact to cultural and/or wilderness resources. *See Mary Byrne, d/b/a Hat Butte Ranch*, 174 IBLA 223, 237 (2008) (reasonable alternatives are ones that "will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser or no impact"). Because the purpose and need of the Lease Sale EA is so broad, SUWA's recommended alternatives would meet those objectives. Indeed, by setting such a broad objective, BLM put itself into a position to consider a broader range of alternatives. National Environmental Policy Act, Handbook H-1790-1 § 6.2.1, at 36 ("The broader the purpose and need statement, the broader the range of alternatives that must be analyzed.").

Adjusting the lease parcel boundaries to account for corrected ACEC boundaries or to eliminate impacts to BLM-identified LWC undeniably would accomplish BLM's broad objective in the present matter. It is indisputable that offering parcels with adjusted parcel boundaries is

[10] As noted in both SUWA's and URARA's comments on the draft Lease Sale EA, URARA provided sensitive cultural information to BLM and requested that that information remain protected from public disclosure. SUWA repeats that request here.

technically and economically feasible. BLM adjusts nominated parcel boundaries for most – if not all – of its lease sales. *See, e.g.*, BLM, Errata Sheet for the Color County District Office June 13, 2017 Competitive Oil and Gas Lease Sale (June 9, 2017) (adjusting the boundary of parcel UT0517-022)[11]; BLM, Errata Sheet for the Green River District December 13, 2016 Competitive Oil and Gas Lease Sale (Dec. 9, 2016) (adjusting the boundary of parcel UT1116-094)[12]; BLM, Errata Sheet for the Canyon County District February 16, 2016 Competitive Oil and Gas Lease Sale (Feb. 9, 2016) (adjusting the boundary of parcel UT0216-001).[13] It is likewise indisputable that SUWA's recommended alternatives will have lesser impacts to important resource values, including cultural and wilderness characteristics.

Second, the Price RMP did not resolve the longstanding and ongoing conflict between oil and gas leasing and development and the protection of wilderness-caliber lands in the Molen Reef region.

Consistent with FLPMA and NEPA, Instruction Memorandum No. 2010-117, *Oil and Gas Planning and National Environmental Policy Act (NEPA)* (May 17, 2010) (IM 2010-117) (attached), explains that BLM-identified LWC, such as that in the Molen Reef region, is an unresolved resource conflict. BLM issued IM 2010-117 in direct response to the "Stiles Report" which had identified systemic problems in Utah BLM's oil and gas leasing process including the agency's failure to properly analyze impacts to BLM-identified LWC. *See generally* U.S. Dep't of the Interior, *Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease Sale* (Oct. 7, 2009) (attached). The Stiles Report explained that even though the Utah RMPs, including the Price RMP, had made management decisions for BLM-identified LWC, those decisions were not the final word on that issue.

> [T]he Team's recommendation to "defer" means that the parcels should not be leased until one or more of the following conditions are met: 1) necessary corrections are made to the leasing documents, including the possible reconfiguration of parcels; 2) *needed analysis is completed and changes are made to the supporting RMPs and associated lease stipulations*; or 3) a finding that conditions are such that leasing would assist in the orderly development of the oil and gas resource.

Id. at 5 (emphasis added). The Stiles Report expressly identified LWC as a resource value for which changes to the respective RMPs, including Price RMP, and lease stipulations should be considered in subsequent NEPA analyses and reviews. *See, e.g.*, *id.* at 7 (stating that parcel 098 should be deferred because "additional stipulations may be found necessary after completion of a revised inventory of wilderness characteristics"); *id.* at 8 (stating that parcel 115 should be deferred to add no surface occupancy stipulations due to "obvious" concerns including "wilderness characteristics"); *id.* (stating that parcel 116 should be deferred so that BLM can review the area "using the soon-to-be-released Wilderness Characteristics Inventory Manual"); *id.* at 8-9 (stating that parcels 086, 087, 335, 337-343, and 345 should be deferred "to reconsider the impacts on documented wilderness characteristics"). Such recommendations make clear that

[11] Available at https://eplanning.blm.gov/epl-front-office/projects/nepa/68693/109424/134043/Errata_6-9-17.pdf.
[12] Available at https://eplanning.blm.gov/epl-front-office/projects/nepa/59590/92377/111321/Errata12-9-16.pdf.
[13] Available at https://www.blm.gov/sites/blm.gov/files/uploads/Feb2016Errata_2_9_2016_508.pdf.

the Interior Department and BLM understood well that the Price RMP did not conclusively resolve oil and gas leasing and development conflicts in BLM-identified LWC.

BLM released IM 2010-117 in response to the recommendations and problems highlighted in the Stiles Report. This IM reiterates that management actions established in RMPs are not the last word with regard to land management decisions but are subject, as anticipated by FLPMA, to ongoing "monitoring and periodic RMP evaluations . . . to determine whether the RMPs adequately protect important resource values in light of changing circumstances, updated policies, and new information." IM 2010-117 § I.A. In other words, the Price RMP designated certain lands in the BLM Price field office as available for oil and gas leasing and development but that designation "does not mandate leasing." *See id.*

Utah BLM Instruction Memorandum No. 2016-027, *Bureau of Land Management (BLM)-Utah Guidance for the Lands with Wilderness Characteristics Resource* (Sept. 30, 2016) (IM 2016-027) (attached), builds on BLM's FLPMA, NEPA and IM 2010-117 mandates and further confirms that the Price RMP did not resolve the longstanding and present conflict between oil and gas leasing and wilderness characteristics. Specifically, it "outlines the process by which BLM Utah will analyze potential impacts to [LWC] through the [NEPA] process and consider potential management options for the [LWC] resource outside of the land use planning process." *Id.* at 1.

IM 2016-26 confirms that the Price RMP is not the last word on LWC management:

> BLM may still reach a decision in an implementation level NEPA document to protect lands with wilderness characteristics even in areas where the land use planning decision does not emphasize the protection of lands with wilderness characteristics as a priority over other multiple uses. BLM should implement reasonable measures to minimize impacts to wilderness characteristics that are consistent with the purpose and need for the project, even when a [land use plan] decision does not offer de facto protection for wilderness characteristics in land use planning allocations.

Id., Attachment 2-2. Further highlighting this point, the IM sets out a framework to guide BLM's NEPA analysis for projects that may impact wilderness characteristics identified both *in the governing RMP* and after completion of that document. *See id.* at Attachment 2-3 (describing the two scenarios involving lands with wilderness characteristics).

BLM is well aware of the historic and ongoing conflict between oil and gas leasing and development and the protection of wilderness-caliber lands. Because this conflict exists BLM needed to analyze, at a minimum, three leasing alternatives in the EA:

> The EA will analyze a no action alternative (no leasing), a proposed leasing action (lease the parcel(s) in conformance with the land use plan), *and* any alternatives to the proposed action that may address unresolved resource conflicts.

IM 2010-117 § III.E (emphasis added). In *Bob Marshall Alliance*, the court held that the issuance of oil and gas leases in an area identified as possessing wilderness characteristics involved unresolved resource conflicts. *See* 852 F.2d at 1229. The court noted that the conflict between these resources "present[ed] a useful illustration of the need for an independent consideration of alternatives requirement." *Id.* It explained that

> the sale of [oil and gas] leases – both NSO *and* non-NSO – involves conflicts as to the present and future uses of [the wilderness-caliber land at issue], because the issuance of the leases may allow or lead to other activities that would affect [the area's] suitability for wilderness designation . . . [, and as a result,] the sale of leases cannot be divorced from post-leasing exploration, development, and production.

Id. When oil and gas leasing opens the door to future development which may impact wilderness characteristics, BLM must give "full and meaningful consideration" to NEPA alternatives. *Id.* And BLM must do so at "the earliest possible time." *New Mexico ex rel. Richardson*, 565 F.3d at 707 (quoting 40 C.F.R. § 1501.2).

Third, assuming, *arguendo*, that the Price RMP somehow resolved the longstanding conflict between oil and gas leasing and development and the protection of wilderness-caliber lands, courts have held that the act of leasing *creates* an unresolved resource conflict by opening the door for future oil and gas exploration and development.

> Because the Deep Creek lease sale opens the door to potentially harmful post-leasing activity, it "involves unresolved conflicts concerning alternative uses of available resources"; NEPA therefore requires that alternatives . . . be given full and meaningful consideration.

Bob Marshall Alliance, 852 F.2d at 1229.

Here, BLM is creating an unresolved conflict by offering fifteen leases in the Eagle Canyon LWC unit. It is opening the door to potentially harmful post-leasing activities and doing so without making an informed choice between alternative courses of action. *See* EA at 8 (analyzing only the no action and proposed action alternatives); *id.* at 64-76 (Appendix A – Proposed Action with Stipulations for Lease). This violates the "heart" of NEPA which requires BLM to perform its NEPA alternatives analysis at "the earliest possible time." *See New Mexico ex rel. Richardson*, 565 F.3d at 707: *see also Colo. Envtl. Coal.*, 185 F.3d at 1175 (stating that after "defining the objectives of the action," the agency must "provide legitimate consideration to alternatives that fall between the obvious extremes").

Fourth, it is immaterial that the State Director may elect in the Decision Record – at his discretion – to "withhold any lease parcel from offering, in whole or in part." Deferral (or adjustment) of parcels in the Decision Record is not NEPA analysis – let alone NEPA alternatives analysis. Rather, in that context BLM is acting pursuant to its broad authority to manage federal public lands under FLPMA and the Mineral Leasing Act (MLA). *See, e.g., Hawkwood Energy Agent Corp. Venture Energy, LLC*, 189 IBLA 164, 170 (2017) ("The MLA's

grant of broad discretion to the [BLM] to decide whether to issue oil and gas leases up until the point of lease issuance is supported by [Interior Board of Land Appeal] and Federal precedent.").

A "Decision Record" is the agency's "decision-making document," National Environmental Policy Act, Handbook H-1790-1 § 8.5, at 84, used to adopt an alternative *analyzed in the EA*. BLM must complete its NEPA analysis including alternatives analysis *prior* to approving its decision (*i.e.*, signing the Decision Record).

> You must finish all of the steps necessary for completing the NEPA process *prior to issuance of a formal decision*, to enable you to make a well-informed decision.

Id. § 1.4, at 3 (emphasis added) (citations omitted). The "NEPA process" BLM must follow prior to issuing its Decision Record (or Record of Decision) is as follows:

- Identify the purpose and need for action and describe the proposed action to the extent known;
- Scoping;
- Identify issues for analysis;
- Refine proposed action;
- *Develop alternatives to the proposed action*;
- *Gather data and analyze the reasonable alternatives*;
- *Describe the environmental effects of the alternatives*;
- Identify mitigation measures; and finally
- Implement [*i.e.*, sign the Decision Record] and monitor.

Id. Fig. 6.1, at 34 (emphases added); *see also id.* § 6.1, at 33. BLM's remarkable assertion that parcel deferral equates to NEPA alternatives analysis is unsupported by law or policy.

Finally, BLM's consideration of the lease-nothing (no action) alternative did *not* satisfy NEPA's mandate that agencies analyze a sufficient range of alternatives to provide a clear basis for choice among options, as further explained in IM 2016-27. BLM's assertion also is at direct odds with IM 2010-117's requirement to consider at least three alternatives, IM 2010-117 § III.E, and IM 2016-27's requirement to "explore alternative means of meeting the purpose and need for [the proposed] action," IM 2016-27, Attachment 2-4. It is immaterial that BLM considered a no leasing alternative because it is *required by law* to consider that alternative and cannot use that alternative as a substitute for other alternatives that it may also be required by law (or policy) to consider.

> "Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact the environment to assiduously fulfill the obligations imposed by NEPA." . . . .
>
> "Informed and meaningful consideration of alternatives – including the no action alternative is an integral part" of NEPA.

S. Utah Wilderness Alliance, 122 IBLA 334, 338 (1992) (citations omitted): *see also S. Utah Wilderness Alliance*, 457 F. Supp. 2d at 1262 ("[A]n agency's [NEPA document] must consider the 'no-action' alternative.").

The no action alternative provided BLM with a baseline, *not* a middle-ground choice among options. *See* EA at 11 ("The No Action Alternative provides a baseline for comparing environmental effects of the Proposed Action alternative."). Here, BLM compared only the extreme lease-everything (proposed action) alternative to this baseline. *See id.* In other words, BLM adopted the extreme alternative without any "consideration to alternatives that fall between the obvious extremes." *See Dombeck*, 185 F.3d at 1175. This approach violates NEPA.

Therefore, BLM failed to analyze a reasonable range of alternatives, as required by NEPA, and its justifications for doing so are arbitrary and capricious.

IV. BLM Failed to Supplement its NEPA Analysis to Consider New Cultural Resource Information[14]

BLM is required to supplement its NEPA analysis if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (stating that NEPA supplementation is necessary "if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered") (citation and internal alternations omitted). "NEPA's duty to supplement applies equally to environmental impact statements and environmental assessments." *S. Utah Wilderness Alliance*, 457 F. Supp. 2d at 1264.

The need to make an informed decision underlies BLM's requirement to supplement its NEPA analysis:

> By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. . . . It would be incongruous with this approach to environmental protection, and with [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Marsh, 490 U.S. at 371. In reviewing BLM's decision not to supplement its NEPA analysis

> courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.

[14] This argument pertains to all Protested Parcels.

Id. at 378. In the present case, URARA provided BLM with significant new cultural resource information for the Molen Reef region, including newly documented sites, data (including GIS shapefile data), maps, and photographs. *See generally* URARA Comments on Draft Lease Sale EA.[15] This new information, like SUWA's new wilderness characteristics information in *Southern Utah Wilderness Alliance*, is "a textbook example of significant new information about the affected environment . . . that would be impacted by oil and gas development; information that [is] not reflected in BLM's existing NEPA analysis." *S. Utah Wilderness Alliance*, 457 F. Supp. 2d at 1264-65. For example:

- URARA has provided BLM with information about approximately 350 new cultural sites discovered in the Molen Reef Region since 2013 – information not considered in the Lease Sale EA nor mentioned or discussed in the 2008 Price RMP. URARA Comments on Draft Lease Sale EA at 2. The majority of these new sites are outside designated ACEC boundaries and on federal public lands classified with only standard lease terms and stipulations. *See* Jonathan Bailey – Cultural Resources Booklet (attached).[16] *See also* MAP – Cultural Resource Density (attached); MAP – Designated and Potential ACEC (attached); MAP – Lease Stipulations (Price RMP);

- URARA provided BLM with the declaration of Mr. Blaine Miller, the former BLM Price field office archeologist. Mr. Miller explained that he had been intimately involved in the planning processes for the 1991 San Rafael Resource Management Plan (San Rafael RMP) and 2008 Price RMP. Mr. Miller highlighted several deficiencies in these planning processes with regard to cultural resources, including, but not limited to:

    - BLM staff did not conduct extensive on-the-ground cultural resource inventories for the 1991 San Rafael RMP – a management plan which encompassed the Molen Reef region;

    - BLM staff did not conduct on-the-ground cultural inventories for the Dry Wash, Kings Crown, Molen Seep, North Salt Wash, or Short Creek Rock Art ACEC for the 2008 Price RMP (which replaced the San Rafael RMP). As a result, when the ACEC was designated in 2008, BLM "lacked the necessary cultural information to properly delineate each ACEC boundary." Instead, BLM designated each ACEC boundary based on assumptions (taken from the Utah BLM Vernal RMP) that cultural resources have a high probability of being located near water and rock art is likely located on or near steep sandstone cliffs. Stated differently, "the ACEC boundaries established in the Price RMP were not based on known cultural resource sites but rather on BLM staff's assumption that such sites likely existed within one mile of waterways or [on/near] steep sandstone cliffs."; and

    - The new cultural resource information "shows that the Molen Reef area is one of the most important historic landscapes in Utah."

[15] SUWA incorporated URARA's comments and exhibits thereto in our comments on the draft EA.
[16] URARA and SUWA provided this booklet to BLM as part of comments on the draft EA. It contains sensitive cultural resource information that we request be protected to the extent permitted by law.

Blaine Miller Statement About Rock Art ACEC in the Greater Molen Reef Area (attached). *See also* Dennis Willis Statement in Support of Blaine Miller Statement (Oct. 1, 2017) (confirming that Mr. Miller accurately described the process behind the Rock Art ACEC designation) (attached). This new information demonstrated that BLM's leasing proposal may affect the quality of the human environment in a significant manner or to a significant extent not already considered. For example, URARA explained that

> because the designated ACEC boundaries were based on limited cultural resource information the NSO stipulations, in many circumstances, are or will be attached to tracts of land with less cultural density or significance than other more culturally rich landscapes that are subject to standard stipulations only.
>
> As a result, the designated Rock Art ACECs and associated oil and gas leasing stipulations do not satisfy the purpose for which they were established *i.e.*, to "protect and prevent irreparable damage to important historic and cultural values." The Kings Crown Rock Art ACEC is an example. Due to inadvertence or lack of information, the Kings Crown is *not* within the Kings Crown Rock Art ACEC as designated in the Price ROD. As such, the land on which the Kings Crown is located is subject only to standard leasing stipulations even through BLM *intended* to protect that resource by requiring NSO stipulations. Similarly, other well-known cultural resource sites are near – but not inside – designated Rock Art ACECs such as the Ferron Boxes, Funk's Cave, Clyde's Cavern, and Horn Silver Gulch. These sites, like many others in the Molen Reef region, are not protected by existing oil and gas leasing stipulations such as NSO stipulations but rather are subject only to standard leasing stipulations. The newly identified cultural sites, like those that were identified in the Price ROD, are fragile and easily damaged whether intentional or not.

URARA Comments on Draft Lease Sale EA at 5 (citations and internal alternations omitted).[17] *See also* Blaine Miller Statement; Dennis Willis Statement. SUWA raised similar concerns in comments on the Lease Sale EA. *See* SUWA Comments at 10-11. *See also* MAP – Cultural Resource Density; MAP – Designated and Potential ACEC; MAP – Lease Stipulations (Price RMP). In light of this new information, SUWA explained that NEPA required BLM to supplement its existing analysis in the Lease Sale EA. *See* SUWA Comments at 11 ("[T]here is no record evidence that 1) BLM has considered whether to amend the Price RMP for the Molen Reef region to protect the relevant and important cultural values in the region from oil and gas leasing and development . . . or 3) evaluated whether existing lease stipulations are appropriate in light of [the] new information.").

[17] BLM has acknowledged in the past that the Rock Art ACEC boundaries need to be corrected. For example, in its five-year evaluation of the Price RMP BLM stated that the Grassy Trail Rock Art ACEC did not protect what BLM intended to protect because the "[r]ock art is on private property and nowhere near the area [BLM is] saying where the ACEC is." BLM, Price RMP Five-Year Evaluation Report at 68 (Sept. 2015), *available at* *https://eplanning.blm.gov/epl-front-office/projects/lup/67041/83195/99800/PFO_RMP_Five-Year_Evaluation_%5b2015%5d.pdf* (attached).

There is, however, no record evidence that BLM considered the significance (or lack of significance) of the new cultural information, or whether to supplement its NEPA analysis to better inform its leasing decision. *See, e.g.*, EA at 120-21 (BLM's response to SUWA's incorporation of URARA's comments does not address NEPA supplementation).[18] *But see Dine Citizens Against Ruining our Environment v. Klein*, 747 F. Supp. 2d 1234, 1263 (D. Colo. 2010) ("In evaluating an agency's decision not to prepare a[] . . . supplemental EA, courts . . . look to see if the agency took the requisite 'hard look' at the new information to determine whether supplemental analysis is necessary."). Notably, BLM did *not* dispute that the new cultural information was significant, or that such information called into question whether the initial leasing proposal may affect the quality of the environment in a significant manner or to a significant extent not already considered. Instead, BLM provide four reasons for not supplementing its analysis:

- "ACEC boundary adjustments are part of the formal RMP planning process and are not associated with this proposed undertaking";
- The Price RMP considered "an alternative which included larger ACEC areas and more restrictive management prescriptions" but BLM did not select that alternative;
- "BLM decided at that time [*i.e.*, in the 2008 Price RMP] that the leasing stipulations, policy, and law pertaining to cultural resources were sufficient protections"; and
- BLM will fulfill its NHPA Section 106 obligations if/when it receives a site-specific development proposal for the leases.

EA at 120-21. None of these justifications address NEPA supplementation and otherwise are arbitrary and capricious for the following reasons.

First, BLM's NEPA obligation to supplement its analysis applies regardless of whether it is engaged in a formal RMP planning process. It is a standalone requirement underlying NEPA's mandate to make an informed decision. *See, e.g.*, 40 C.F.R. § 1502.9(c)(1)(ii) (BLM must supplement its NEPA analysis if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"); *Marsh*, 490 U.S. at 374 (same).

In *Southern Utah Wilderness Alliance*, the court held that BLM violated NEPA when it failed to supplement its NEPA analysis to consider the significance (or lack of significance) of new information regarding wilderness resource values. 457 F. Supp. 2d at 1264. In that case, after completion of the relevant land use plan, BLM had itself documented new wilderness resources within its planning area and had obtained additional wilderness characteristics information from

[18] BLM provides no response in the Lease Sale EA to URARA's comments. This runs counter to BLM's NEPA obligation to respond to substantive comments provided by members of the public including URARA. *See* 40 C.F.R. § 1502.9(b) (explaining that NEPA requires federal agencies to respond explicitly and directly to "responsible opposing view[s]"). In any manner, SUWA therefore presumes that BLM's response to SUWA's incorporation of URARA's comments regarding ACEC boundary corrections (listed in the EA as Comment 24 and 25) serves as the only response in this matter.

the public, including SUWA. *Id.* The new information "presented a textbook example of significant new information about the affected environment . . . that would be impacted by oil and gas development; information that was not reflected in BLM's existing NEPA analysis." *Id.* at 1264-65. BLM, however, did not supplement its NEPA analysis – a decision the court held to be unlawful.

> BLM cannot know what the environmental effects of leasing and development will be to the specific wilderness values, in these specific places, if it declines to undertake the necessary supplemental analysis to evaluate whether its current leasing categories adequately protect these newly identified resources.

Id. at 1266 (citing *Marsh*, 490 U.S. at 371). NEPA's informed decisionmaking mandate required BLM to think first, then act. *Id.* at 1267.

> NEPA does not sanction this approach of "lease now, think later." To the contrary, NEPA required that BLM postpone leasing in areas where the agency had significant new information about wilderness values that had not been adequately accounted for.

Id. BLM has made all the same mistakes with regard to new cultural resource information in the present case.

Second, BLM can add NSO leasing stipulations through plan maintenance (and avoid preparation of a plan amendment) to the federal land encompassed by the proposed corrected ACEC boundaries to protect the newly documented cultural resources. BLM can do so because the NSO stipulations were previously analyzed in the Vernal RMP. As explained in IM 2010-117:

> Resources on the ground change over time . . . . Prior to the lease sale, the field office will review its latest inventory information and apply protective lease stipulations to new leases as provided for in the RMP. Applying an existing RMP lease stipulation . . . to the proposed new lease, based on new inventory data . . . is considered to be in conformance with the RMP and is addressed through plan maintenance. *Plan maintenance is the appropriate planning tool even if the land area where the new resource is found . . . had been designated in the RMP as covered by standard lease terms.*

Id. § III.C.2 (emphasis added). *See also* BLM, Price RMP Five-Year Evaluation Report at 3 (explaining that BLM through plan maintenance can apply "an existing oil and gas lease stipulation to a new area prior to the lease sale based on new inventory data"). Here, URARA and SUWA requested that BLM apply the *existing* NSO stipulation created in the Price RMP to the federal tracts encompassed by the newly documented cultural sites including rock art. At no time did URARA or SUWA request that BLM create a *new* leasing stipulation. BLM's assertion that it had to prepare a RMP amendment to respond to the new information is therefore unsupported by its own policy and guidance.

Third, it is immaterial that the Price RMP considered larger Rock Art ACEC boundaries that *generally* encompassed the new cultural resource information including rock art sites. The larger ACEC boundaries – like the designated boundaries – were based on BLM staff assumptions regarding areas likely to contain cultural resources, not on known cultural resources documented through on-the-ground surveys. *See, e.g.*, Blaine Miller Statement; Dennis Willis Statement. BLM never disputed this point. In fact, BLM provided no response to Mr. Miller's statements.

The larger ACEC boundaries considered in the Price RMP did not encompass the majority of the newly documented sites or URARA's recommended ACEC boundaries. *See* MAP – Cultural Resource Density; MAP – Designated and Potential ACEC; MAP – Lease Stipulations (Price RMP). The fact that BLM may understand the potential impacts to cultural resources from oil and gas leasing and development on a broad level is no excuse for the failure to supplement its NEPA analysis:

> NEPA does not permit an agency to remain oblivious to differing environmental impacts, or hide these from the public, simply because it understands the general type of impact likely to occur. Such a state of affairs would be anathema to NEPA's "twin aims" of informed agency decisionmaking and public access to information.

New Mexico ex rel. Richardson, 565 F.3d at 707. Moreover, the larger ACEC boundaries are immaterial for a second reason: the Price RMP is a programmatic field-office-wide land use plan which did not analyze the site-specific impacts to cultural resources in the Molen Reef region from oil and gas leasing and development. *See, e.g.*, Price RMP at 1-5 ("The BLM uses RMPs to make land use allocations, provide general future management direction for managing specific areas of land, and provide the framework for management of all natural resources under BLM authority").

Fourth, the fact that, in BLM's opinion, the lease stipulations adopted in 2008 were sufficient to protect cultural resources says nothing with regard to the adequacy of those stipulations now in light of the significant new information collected by BLM and provided by members of the public, including URARA and SUWA. BLM has an ongoing obligation to manage federal public land "in a manner that will protect the quality of scientific, . . . historical, . . . and archeological values," 43 U.S.C. § 1701(a)(8), and to "take any action necessary to prevent unnecessary or undue degradation of the lands," *id.* § 1732(b).

The Price RMP recognized that the lease stipulations may need to be updated, including through a land use plan amendment:

> Review all lease parcels prior to lease sale. If the [Price field office] determines that new resource data information or circumstances relevant to the decision is available at the time of the lease review that warrants changing a leasing allocation or specific lease stipulation, the [Price field office] will make appropriate changes through the plan maintenance or amendment process.

Price ROD at 125 (MLE-6). Nowhere in the Price RMP is there support for BLM's position now that the established oil and gas leasing stipulations are unchangeable and set in stone, nor could there be without running afoul of NEPA and FLPMA. *See also* MAP – Cultural Resource Density; MAP – Designated and Potential ACEC; MAP – Lease Stipulations (Price RMP). BLM recognized as much when it deferred oil and gas lease parcels in the Molen Reef region from the November 2013 sale due to its lack of existing cultural resource knowledge:

> The Price Field Office possessed limited information on the cultural resources of the proposed lease sale areas due to a lack of previous projects in those areas. [URARA] approached the Price Field Office with concerns about rock art sites they knew about in the Molen Reef locality. URARA presented hundreds of data points for rock art sites, showing a high concentration of prehistoric cultural activity in the area. *This information helped to defer the lease sale. URARA's information helped the Price Field Office realize how culturally sensitive this area is.*

BLM, Notes from Molen Reef Class I & II Consulting Parties Meeting at *4-5 (Sept. 14, 2016) (attached) (emphasis added). Likewise, BLM deferred parcels from the Molen Reef region for similar reasons in 2015. *See, e.g.*, BLM, November 2015 Oil and Gas Lease Sale, DOI-BLM-UT-G021-2015-0031-EA, Appendix B at 4 (Aug. 2015) (Preliminary Parcels Not Included in Nov. 2015 OG Sale Map 3 – parcels nominated for Molen Reef region removed from lease sale).

Furthermore, as noted *supra* in Section III, IM 2010-117 and IM 2016-27 build on FLPMA's and NEPA's mandates to require BLM to review decisions made in the Price RMP including for lease stipulations. For example, IM 2010-117 requires BLM *in the oil and gas leasing context* to:

- Determine parcel availability;
- *Evaluate existing stipulations*;
- *Identify new stipulations, if applicable*;
- Provide for public involvement; and
- Develop detailed background information for the NEPA compliance process.

IM 2010-117 § III (emphases added). "If the lease stipulations do not provide adequate resource protection, it may be necessary to develop new lease stipulations or revise existing ones." *Id.* § III.C.2. IM 2016-27 has similar requirements. IM 2016-27, Attachment 2-2 ("BLM may still reach a decision . . . to protect lands with wilderness characteristics even in areas were the land use planning decision does not emphasize the protection of [such lands] as a priority over other multiple uses."). Thus, it is indisputable that the management prescriptions, including lease stipulations in the Price RMP, were not – and cannot be relied on as – the last word on the issue.

Finally, BLM cannot excuse its failure to supplement its NEPA analysis (or to even consider the significance or lack of significance of the new cultural resource information) because it intends to comply with its separate and distinct legal obligations under Section 106 of the NHPA. *See* EA at 121 (BLM stating that it will fulfill its Section 106 obligations when it receives a site-specific development proposal for any of the leases). NEPA's and NHPA's legal requirements

are related but independent of each other and compliance with one statute does not excuse noncompliance with the other. *See, e.g.*, 40 C.F.R. § 1502.9(c)(ii) (NEPA requires BLM to supplement its NEPA analysis if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"); 54 U.S.C. § 306108 (NHPA prohibits BLM from approving any "undertaking" unless the agency takes into account the effects of the undertaking on historic properties).

Therefore, there is no record evidence that BLM considered whether to supplement its NEPA analysis in the Lease Sale EA based on the significant new cultural resource information and its reasons for refusing to consider the significance of that information are arbitrary and capricious.

V. BLM Failed to Take a Hard Look at the Potential Rock Art ACEC and Failed to Give Priority to the Protection of Relevant and Important Cultural Values[19]

The BLM failed to give priority to the protection of identified relevant and important cultural values in the larger potential Rock Art ACEC. As noted, the Price RMP considered a larger Rock Art ACEC boundary but did not adopt that alternative because BLM believed – incorrectly – that the smaller ACEC boundaries were sufficient. Price RMP at 4-325 ("The smaller areas of protection would focus the management stipulations on the areas with [relevant and important] values rather than on thousands of acres without any cultural [relevant and important values]."). *See* also MAP – Designated and Potential ACEC. BLM based this conclusion on the *assumption* – not verified by on-the-ground inventories – that such resources only likely existed within a short distance from waterways or on/near sandstone cliffs. *See* Blaine Miller Statement; Dennis Willis Statement. URARA's new cultural resource information demonstrated that BLM's assumptions were incorrect: the larger Molen Reef region, including the area within the larger potential ACEC boundaries, does in fact have remarkable and sensitive cultural resource value.

Despite the new information, BLM concluded that it did not need to correct – or even consider correcting – the Rock Art ACEC boundary for the same four reasons it declined to supplement its NEPA analysis. *See* EA at 120-21. BLM's reasoning in this regard is arbitrary and capricious for the same reasons discussed *supra in* Section IV. Specific to the potential Rock Art ACEC, BLM's reasoning is arbitrary and capricious for two additional reasons: 1) FLPMA requires BLM to give priority to the protection of BLM-identified relevant and important values in the larger potential Rock Art ACEC and 2) the new cultural resource information contains relevant and important cultural values that need protection through special management attention.

ACEC boundary corrections or modifications are *not* outside the scope of the Lease Sale EA. FLPMA requires BLM to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values . . . giving priority to [ACECs]." 43 U.S.C. § 1711(a). Lands encompassed by a potential or designated ACEC are "areas within the public lands where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural" and other values. *Id.* § 1702(a). At all times, BLM must give priority to the protection of identified relevant and important values. *Id.* § 1712(c)(3). URARA's new information showed that the land encompassed by the larger Rock Art ACEC

[19] This argument pertains to all Protested Parcels.

considered in the Price RMP contains the cultural resources that BLM in 2008 assumed to exist and thus need special management attention.

In 2008 BLM lacked extensive on-the-ground knowledge regarding cultural resources in the Molen Reef region. As a result, BLM designated the Rock Art ACEC boundaries to serve as a "buffer" which it *hoped* would protect the cultural resources that likely existed in the region. *See* Blaine Miller Statement; Dennis Willis Statement. *See also* Booz, Allen, Hamilton, *Concerns/Issues for ACEC alternatives and analysis raised during Feb 2, 2006 teleconference Booz Allen (Q. Bahr) and BLM (B. Higdon, B. Miller, D, Willis)* at 1 (noting that the smaller Rock Art ACEC "is approximately 1/3 fewer acres than under alternatives A-C [in the Price RMP]") (attached); Dennis J. Willis, The ACEC Morass in the Price Field Office (March 25, 2005) (Dennis Willis explaining that the Price RMP relied on the relevant and important values evaluation for the outdated San Rafael RMP – an evaluation which was "sketchy at best") (attached). For example, BLM staff highlighted numerous mistakes with the ACEC evaluations in the Price RMP including the fact that, among other problems,

> [potential ACEC] [a]reas are only to be dropped if they fail to meet either the relevance or importance criteria. [However,] [BLM] ha[s] dropped nominated ACEC's that clearly have relevance and importance.

Willis, The ACEC Morass at 2. These past assumptions and mistakes need to be corrected.

IM 2010-117 and BLM Manual 1613 both build on FLPMA's mandate to protect identified relevant and important values including cultural. In *the oil and gas leasing context* IM 2010-117 requires BLM to "evaluate existing stipulations" and "identify new stipulations, if applicable." IM 2010-117 § III. It requires further that

> [T]he field office will evaluate whether oil and gas management decisions identified in the RMP (including lease stipulations) are still appropriate and provide adequate protection of resource values . . . . If the lease stipulations do not provide adequate resource protection, it may be necessary to develop new lease stipulations or revise existing ones.

IM 2010-117 § III.C.2. As noted *supra*, in light of URARA's new cultural resource information BLM could have added the existing NSO stipulation in the Price RMP to the federal tracts of land encompassed by the proposed corrected ACEC boundaries at the lease sale stage but declined to do so. *See id.* ("Plan maintenance is the appropriate planning tool even if the land area where the new resource is found . . . had been designated in the RMP as covered by standard lease terms.").[20]

[20] This approach, protecting the new cultural sites through plan maintenance through use of the existing NSO stipulation, was never considered by BLM. Instead, BLM concluded – incorrectly – that the *only* available option to protect the cultural sites was through an amendment to the Price RMP. *See* EA, Appendix D at 121 ("A formal RMP amendment or changes in a new RMP would be needed to change the boundaries.").

BLM Manual 1613 explains further that FLPMA's special management requirement for relevant and important values applies equally to the land use planning process as to considering the adequacy of existing stipulations in subsequent step-down NEPA processes:

> "Special management attention" refers to management prescriptions developed during preparation of an RMP *or amendment expressly to protect [such values] of an area from the potential effects of actions permitted by the RMP, including proposed actions deemed to be in conformance with the terms, conditions, and decisions of the RMP.*

BLM, 1613 – Areas of Critical Environmental Concern § .12 (Sept. 29, 1988) (emphasis added) (attached).

FLPMA's ongoing mandate that BLM give priority to the protection of identified relevant and important values, coupled with agency guidance and policies, require BLM to do more than it has done here. BLM recognized in the Price RMP that the Molen Reef region likely contained remarkable cultural density and diversity and sought to protect that resource through the designation of the Rock Art ACEC. In hindsight, BLM underestimated how special the Molen Reef region really is. BLM does not dispute this point. Neither the Lease Sale EA nor the Price RMP explain how the standard leasing stipulations established in the RMP are sufficient in light of the newly documented cultural sites, including rock art. Rather, the Price RMP concluded the opposite: NSO stipulations are necessary to protect identified relevant and important cultural values. *See, e.g.*, Price ROD at 134 (oil and gas will be open to leasing in the Rock Art ACEC subject to major constraint (NSO stipulations)); Price ROD, Map R-25 (fluid mineral leasing categories). *See also* MAP – Cultural Resource Density; MAP – Designated and Potential ACEC; MAP – Lease Stipulations (Price RMP).

FLPMA does not allow BLM to stick its head in the sand to ignore URARA's significant new cultural resource information nor does it allow BLM to ignore prior mistakes and inaccurate assumptions made in the Price RMP. Therefore, BLM has failed to give priority to the protection of cultural resources in the Molen Reef region.

VI. BLM Failed to Take a Hard Look at Impacts to Cultural Resources[21]

In addition to BLM's obligations under the NHPA, NEPA requires BLM to take a "hard look" at the environmental effects of a proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d at 781. An EA must demonstrate "the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project." *Id.* (quoting *Comm. To Preserve Boomer Lake Park*, 4 F.3d at 1553). "General statements about 'possible' effects … do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

BLM failed to take the requisite "hard look" at impacts to cultural resources. First, BLM's no adverse effect determination is based on insufficient information. As discussed *infra* in Section

[21] This argument pertains to all Protested Parcels.

II only 2.9% of the lease sale area has been surveyed for cultural resources and four parcels have not been surveyed *at all*. EA at 18. Because BLM has so little information about cultural resources in the lease area, it cannot meaningfully analyze the potential impacts to that resource.

Second, BLM's discussion of direct, indirect, and cumulative impacts to cultural resources is wholly insufficient. Rather than the required thoughtful and probing reflection of possible impacts, the EA includes only a cursory discussion of impacts to cultural resources. *See* EA at 36. It merely lists several potential impacts that may result from development on the lease parcels and notes that those impacts "must be taken into account" at the development stage. *Id.*; *see also id.* at 51 (stating that leasing would not contribute to cumulative impacts on cultural resources, but then listing several potential cumulative impacts from future development). This does not constitute a "hard look" at impacts to cultural resources.

VII. BLM's Treatment of Federally-Listed Plant Species Violated the Endangered Species Act[22]

BLM must consult with the United States Fish and Wildlife Service (FWS) under ESA Section 7(a)(2) to ensure its action will not cause jeopardy to San Rafael cactus (*Pediocactus despainii*) and Wright Fishhook cactus (*Sclerocactus wrightiae*). BLM asserts that it has complied with its obligations because the agency completed a "Wildlife and Botany Leasing Report" and will analyze site specific impacts at the Application for Permit to Drill (APD) stage. *See* EA, Appendix D, at 124-26. This is not sufficient.

Each of the nominated parcels include potential, suitable, and/or occupied habitat for both the San Rafael cactus and Wright Fishhook cactus. BLM, Wildlife and Botany Resources Leasing Assessment, at 34 (2017) (Leasing Assessment). These species are especially vulnerable to habitat disturbances and habitat fragmentation because of small populations and specialized habitat requirements. *See, e.g.*, U.S. Fish & Wildlife Serv., Winkler cactus (*Pediocactus winkleri*) AND San Rafael cactus (*Pediocactus despainii*) Draft Recovery Plan, at 32 (Dec. 2015) (attached). Oil and gas development can destroy habitat, increase erosion, and fragment habitat; it is a significant threat to the species. *Id.* at 46.

To alleviate threats to listed plants like the San Rafael cactus, FWS recommends that federal agencies "avoid loss of occupied habitat" and conserve occupied and potentially occupied habitat in a natural state. Leasing Assessment at 84. FWS also states that agencies should evaluate oil and gas leases in occupied or suitable habitat before offering them for lease and *consult FWS before lease sales move forward*. *Id.* Deferring consultation until the APD stage will not adequately address threats to threatened species. The Gasco Biological Opinion highlights the ineffectiveness of deferring consultation to the APD stage:

> On a broader landscape scale, the section 7 consultation process has been less effective at minimizing impacts to *Sclerocactus wetlandicus* because: individual consultations are minimally effective at mitigating landscape-scale cumulative impacts … As a result, hundreds of energy development projects have been approved across the landscape of the Uinta Basin. As a result, habitat fragmentation, fugitive dust, invasive species, and

[22] This argument pertains to all Protested Parcels.

> hydrologic changes have increased across the landscape. In the foreseeable future these disturbances are likely to reach a level at which recovery of *S. wetlandicus* will be appreciably reduced.

BLM, Final Environmental Impact Statement, Gasco Energy Inc. Uinta Basin Natural Gas Development Project, DOI-BLM-UT-G010-2006-0235-EIS, app. S, at 15 (attached).

The only way BLM can ensure that it will not cause jeopardy to listed plant species is to consult with FWS at the leasing stage – the time at which BLM can properly analyze landscape-level impacts to the species, assess whether additional lease stipulations are necessary, and defer leasing if necessary.[23] BLM acknowledges that it has not done so for this lease sale. *See e.g.*, EA, Appendix D at 124 (noting that BLM will consult with FWS when an applicant submits and APD). Failure to consult at the lease sale stage violates the requirements of the ESA.

VIII. BLM Has Failed to Take a Hard Look at Endemic, Threatened and Endangered Cacti Species[24]

BLM's minimal consideration of impacts to threatened plant species does not comply with NEPA's hard look mandate. BLM does not even acknowledge potential cumulative impacts of leasing and instead claims that leasing would not contribute to cumulative impacts to the species. *See* Leasing Assessment at 35. *Cf.* Gasco Biological Opinion (establishing that deferring consultation does not adequately protect threatened plant species because those consultations do not minimize landscape-level cumulative impacts). Such cursory treatment of potential impacts hardly qualifies as a thorough and probing review.

REQUEST FOR RELIEF

SUWA respectfully requests the withdrawal of the fifteen Protested Parcels from the December 12, 2017, competitive oil and gas lease sale until such time as BLM resolves the above-discussed violations. Alternatively, BLM could attach non-waiveable no-surface occupancy stipulations to each of the leases and offer them for sale.

This protest is brought by and through the undersigned on behalf of SUWA. The members and staff of SUWA reside, work, recreate, or regularly visit the areas to be impacted by the proposed lease sale and therefore have an interest in, and will be adversely affected by, the proposed action.

---

[23] Consultation at the lease sale stage is all the more important here because BLM is relying on unenforceable lease notices (T&E-15 & T&E-17) rather than lease stipulations to protect these listed species.

[24] This argument pertains to all Protested Parcels.

DATED: October 2, 2017

Stephen H.M. Bloch
Laura Peterson
Landon Newell
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, UT 84111